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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~748~~ 45

FEDERAL POWER COMMISSION, *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK, and TRANSCONTINENTAL GAS PIPELINE CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Southern California Gas Company and Southern Counties Gas Company of California respectfully move for leave to file the accompanying brief *amici curiae* in this case. The consent of the petitioner has been obtained. The consents of the respondents have been requested but have not been granted. Notwithstanding objection, movants participated in the Court below as *amici curiae*.

The movants, as affiliated public utilities, own and operate the largest retail gas distribution system in the United States, serving over 8,000,000 people in Southern California. All of their interstate gas supplies are

sold to them for resale and hence are subject to Federal Power Commission certificate and rate jurisdiction.

The movants are concerned because the misinterpretation of the Natural Gas Act by the Court of Appeals would severely limit the Commission's authority to grant or deny a certificate of public convenience and necessity for the transportation of natural gas in interstate commerce if such gas is not intended for resale. The movants request the opportunity to demonstrate to the Court that the Act's comprehensive regulatory protection of natural gas distribution companies and their millions of small consumers would be undermined—that, in fact, the result of the lower Court's decision would be to convert a portion of the Act's intended protection of the public into an unintended burden upon the jurisdictional resale customer who must depend upon fully regulated gas service.

Movants are profoundly affected by the decision below and believe that they can make a contribution to the Court's understanding of the economic factors which must not be overlooked in this, the latest maneuver to nullify regulatory control of natural gas moving in interstate commerce.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of the *Amici* in this case is set forth in the motion to which this brief is attached.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is of Broad National Significance Because It Seriously Impairs the Effective Administration of the Natural Gas Act. Unless the Lower Court's Error Is Promptly Corrected Irreparable Harm Will Result to Consumers Who Must Depend Upon Fully Regulated Gas Service.

The decision below requires the Federal Power Commission to authorize interstate transportation of gas purchased in the field for direct consumption, if the transportation service is technically and economically feasible, irrespective of the impact of the transaction on the regulated natural gas industry. It thus sets the pattern for large industrial customers to buy their supplies of natural gas in the field free from regula-

tory scrutiny, despite the adverse effect such interstate purchases may have on the millions of smaller customers served by existing gas pipeline and distribution companies.

Under such direct sale-transportation arrangements, the purchase and sale of the gas are wholly non-jurisdictional so far as price regulation by the Federal Power Commission is concerned. Since certificates of public convenience and necessity are not required by producers making the direct sales, the initial prices are not subject to careful Commission scrutiny, which this Court held imperative in *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378 (1959). These factors provide strong incentives which attract the producers into this type of transaction.

The consequences of the limitations placed on the Commission's discretion by the decision below are obvious. Large industrial customers will certainly be encouraged by it to bid for and secure independent supplies of gas in the field.[1] Typical pipeline and distribution companies—whose gas purchases for resale must continue to be subject to regulation—will be effectively limited to such remaining supplies as pro-

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[1] As a result of this decision, "interest has quickened in the possibility of interstate pipeline transportation of gas in lieu of interstate pipeline sale. More contracts could result. Independent producers might see merit in delivering their own gas via interstate pipeline . . . for direct industrial use." (*American Gas Association Information Service*, November 13, 1959.)

". . . it will encourage gas producers to go ahead with similar projects. Several companies have similar plans in the proposal stage but have been waiting for the courts to clear up the picture on regulation." (*Oil and Gas Journal*, November 9, 1959.)

"The legal decision could open the door for producers with sizeable reserves to avoid federal regulatory entanglements by selling their gas to (an industrial user), or perhaps remain under federal jurisdiction and go into the pipeline business for themselves." (*Petroleum Week*, November 13, 1959.)

ducers will be willing to offer after exhausting all opportunity to sell at an unregulated price. The Commission's authority over interstate transportation service necessary to the consummation of such "direct" retail sales in interstate commerce will be confined to a perfunctory determination as to whether the proposed service meets "conventional" tests of public convenience and necessity (which go merely to the ability of the applicant to carry out the proposed project). The Commission is in fact required to ignore the far more important aspects of the proposal, namely the possible adverse effect of such sales on the industry and their particular effect on wholesales in interstate commerce which the Commission *is required* to regulate.[2]

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[2] Here, the Commission considered the implications of the proposed project arising from (R. 178a-179a):

1. The precedent created by its approval of a method of evading the general regulatory scheme provided by the Natural Gas Act;
2. Pre-emption, by non-jurisdictional gas, of pipeline capacity which would otherwise be available to meet more urgent and widely beneficial public needs;
3. The resulting increased bidding for limited gas supplies which would unnecessarily increase prices;
4. The discriminatory advantage the large purchaser would have over the smaller purchaser;
5. The marginal utility of gas destined solely and exclusively for boiler fuel use.

All of these factors weighed against the grant of the certificate in this case. The Court of Appeals, however, dwelt upon the fifth factor—the end-use consideration—despite the following statement in the Commission's order denying application for rehearing (21 F.P.C. 399, 401, 1959 (R. 189a)):

> "Contrary to applicants' contentions, we do not view the proposed end use of the gas involved in this case as of decisive importance. In accordance with the *National Coal Ass'n* case, it is but one factor, and that not of determinative importance, which we consider in the exercise of our judgment on all the facts."

In *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) this Court interpreted Section 1(b) of the Natural Gas Act to include wholesale interstate sales by producers, thus giving effect to the Act's intent and purpose of protecting consumers from excessive gas prices. Similarly, in *Atlantic Refining Company* v. *Public Service Commission, supra*, p. 367, this Court held that the certificate and rate provisions of the Act are part of an integrated whole which constitutes the "heart" of the Act. By contrast, the decision below narrows the scope of the Commission's authority to protect gas consumers—viz., the power of the Commission to refuse to authorize a service subject to its jurisdiction, which, it concludes, after examination of *all* pertinent factors, will adversely affect the public interest. Indeed, if the decision below stands, the ultimate consumer, who was to be protected by the decisions in *Phillips* and *Atlantic Refining*, will find that, since his interstate gas supply must be purchased for resale and thus subject to regulatory control, a barrier to acquisition of gas by his supplier will exist whenever producers can dispose of it in "unregulated" transactions to large industrial users.

II. Prompt Review Is Necessary Because of the Detrimental Impact of the Decision Below on Regulated Natural Gas Markets and Rates.

The decision below, by encouraging development of direct interstate sales and transportation for industrial uses, will most seriously disrupt the delicate and essential load balance in the existing regulated market by imperiling industrial sales of gas by regulated distributors—sales which are essential to protect domestic consumers against excessive costs and resulting high prices. Thus, the decision poses a substantial threat to the nation's regulatory scheme, and almost certainly will "throw existing rate structures out of balance."

cf. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959).

The importance of industrial gas sales by regulated gas distribution companies in providing lower costs and rates to all consumers has already been recognized by this Court, in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 520-521 (1947), and *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U.S. 330, 334 (1951).

In contrast to State regulation of direct pipeline sales, regulation which this Court held valid in the foregoing Michigan and Indiana cases, consumer state regulatory bodies would find it difficult if not impossible to regulate interstate industrial field purchases of gas in producing states. Furthermore, consumer state regulatory commissions, assuming they had the statutory authority to regulate the various aspects of such transactions at all, could not be expected to understand and certainly would not be governed by the need to avoid injury to *interstate* markets and the *national* public interest, which the Natural Gas Act was enacted to prevent. Thus, the regulatory "gap" firmly closed by this Court in *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U.S. 682 (1947) and *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 682 (1954) would spring open in a new form, with a resulting loss of effective control over consumer gas prices.

CONCLUSION

If the lower Court's misinterpretation of the Natural Gas Act is allowed to stand, the Federal Power Commission's administration of the Act will be unduly restricted. A substantial amount of gas will be sold—largely for industrial purposes—outside of essential

Federal regulatory scrutiny. The decision would allow natural gas to be pre-empted exclusively for limited direct industrial purposes. It would encourage the unnecessary bidding up of the price of natural gas in the field. It would divert essential future supplies of gas from possible domestic and commercial use. It would remove important load-balancing industrial sales from natural gas transmission pipeline and distribution company revenues, throwing existing rate structures out of balance to the detriment of domestic consumers who are dependent for economical service upon a high load factor operation by their suppliers. In sum, there would be a substantial undoing of the pattern of the Commission regulation of the distribution company, pipeline, and independent producer segments of the natural gas industry as contemplated under the Natural Gas Act and this Court's recent landmark decisions in *Phillips Petroleum Company* v. *Wisconsin* and in *Atlantic Refining Company* v. *Public Service Commission, supra.* The petition for the writ of certiorari should, therefore, be granted so that the decision of the Court of Appeals below may be reversed and vacated.

Respectfully submitted,

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